Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1975

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA,

Petitioner,

vs.

DONNY BRURELL BUCKLEY AND ALYCIA MARQUESE BUCKLEY, BY THEIR PARENT AND NEXT FRIEND, RUBY L. BUCKLEY, ON BEHALF OF THEMSELVES AND ALL NEGRO SCHOOL AGE CHILDREN RESIDING IN THE AREA SERVED BY THE ORIGINAL DEFENDANTS HEREIN; UNITED STATES OF AMERICA; THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA; ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Table of Authorities	i
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provision and Statutes Involved	4
Statement of the Case	5
Reasons for Granting the Writ	12
Conclusion	20

TABLE OF AUTHORITIES.

Cases.

Bradley v. Milliken, 484 F. 2d 215 (6th Cir. 1973) 6

Hills v. Gautreaux, 425 U. S. 284 (1976) 19

Keyes v. School District No. 1, Denver, Colorado, 413 U. S. 189 (1973) 15, 16, 17

Milliken v. Bradley, 418 U. S. 717 (1974) 6, 7, 15, 18

Spencer v. Kugler, 404 U. S. 1027 (1972) 17

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971) 19

United States v. Board of School Commissioners etc., 332 F. Supp. 655 (S. D. Ind. 1971), *affirmed*, 474 F. 2d 81 (7th Cir. 1973), *cert. denied*, 413 U. S. 920 (1973) .. 5

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252 (1977) 3, 7, 13, 14

Washington v. Davis, 426 U. S. 229 (1976) 3, 7, 13, 14

Constitutional Provision.

Fourteenth Amendment, Section 1 4

Statutes.

Indiana Acts 1937, Ch. 207, as amended by Indiana Acts 1965, Ch. 384 4
Indiana Acts 1937, Ch. 209 4
Indiana Acts 1961, Ch. 186 ..... 4, 6
Indiana Acts 1969, Ch. 52 ..... 4, 6
Indiana Acts 1969, Ch. 173 ..... 4, 5
Indiana Code, 20-4-1 10
Indiana Code, 20-8.1-6.5 7
National Housing Act, § 236 12
28 U. S. C. § 1254(1) 2
28 U. S. C. § 1343(3) 5
42 U. S. C. § 1415 4
42 U. S. C. § 1983 5
42 U. S. C. § 2006c—6(a) and (b) 5

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 29, 1980, in this case.*

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* Parties to the proceeding in the United States Court of Appeals not listed in the caption are:

(Footnote continued on next page.)

OPINIONS BELOW.

The principal, concurring and dissenting opinions of the United States Court of Appeals for the Seventh Circuit dated February 14, 1978, on remand from this Court (429 U. S. 1068) are reported at 573 F. 2d 400. (A54-A83) The opinion of the United States District Court for the Southern District of Indiana dated July 11, 1978, on remand from the court of appeals is reported at 456 F. Supp. 183. (A84-A100) The opinion of the district court dated April 24, 1979, on a subsequent limited remand from the court of appeals (A101-A129) and the judgment pursuant thereto dated July 9, 1979 (A130-A135), are unreported. The majority and dissenting opinions of the court of appeals dated April 29, 1980, on the appeals taken from said judgment are unreported. (A1-A53) Copies of the foregoing are set forth in the joint appendix at the pages indicated.

JURISDICTION.

The judgment of the court of appeals sought to be reviewed is dated and was entered on April 29, 1980, and a copy is set forth in the joint appendix. (A136-A137) No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

(Footnote continued from preceding page.)
The Metropolitan School District of Decatur Township, Marion County, Indiana; The Franklin Township Community School Corporation, Marion County, Indiana; The Metropolitan School District of Lawrence Township, Marion County, Indiana; The Metropolitan School District of Pike Township, Marion County, Indiana; The Metropolitan School District of Warren Township, Marion County, Indiana; The Metropolitan School District of Washington Township, Marion County, Indiana; The Metropolitan School District of Wayne Township, Marion County, Indiana; School City of Beech Grove, Marion County, Indiana; School Town of Speedway, Marion County, Indiana; The Housing Authority of the City of Indianapolis, Indiana; The Metropolitan Development Commission of Marion County, Indiana; Otis R. Bowen, as Governor of the State of Indiana; Theodore L. Sendak, as Attorney General of the State of Indiana; Harold H. Negley, as Superintendent of Public Instruction of the State of Indiana; The Indiana State Board of Education, a public corporate body; and The Indiana State Teachers Association.

QUESTIONS PRESENTED.

1. Whether, on remand from this Court for further consideration of this case in the light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), and *Washington* v. *Davis*, 426 U. S. 229 (1976), the court of appeals erroneously approved findings that the actions of the Indiana General Assembly—in failing to expand the boundaries of the Indianapolis Public Schools to the county limits when in 1969 it reorganized and consolidated various but not all city and county civil governmental functions in Marion County—and of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County—in locating all public housing projects within the boundaries of the Indianapolis Public Schools—were done, at least in part, with a racially discriminatory intent and purpose.

2. Whether the court of appeals erroneously found that the failure of the Indiana General Assembly to consolidate the eleven public school districts in Marion County in 1969—when various but not all city and county civil governmental functions were reorganized and consolidated—had a significant segregative interdistrict impact because it curtailed the power of the Indianapolis Public Schools system to accomplish desegregation by spreading its black school population throughout a larger area, although only the Indianapolis Public Schools had been found to have operated a dual school system and the other ten school systems in the county had been found to have always operated unitary school systems.

3. Whether the court of appeals erroneously held that the action of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating all public housing projects within the boundaries of the Indianapolis Public Schools, without any discriminatory action by the school authorities, is a constitutional violation re-

quiring remedial action by an interdistrict school desegregation decree.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes of the State of Indiana involved in the holding that the failure to expand the boundaries of the Indianapolis Public Schools in 1969 was a constitutional violation warranting an interdistrict school desegregation remedy are: Acts 1961, Ch. 186, pp. 431-442 (A138-A151); Acts 1969, Ch. 52, pp. 57-58 (A151-A153); and Acts 1969, Ch. 173, pp. 357-448 (A154-A167), which are set forth in pertinent part in the joint appendix at the pages indicated.

The statutes involved in the holding that the locating of all public housing projects within the area served by the Indianapolis Public Schools was a constitutional violation warranting an interdistrict school desegregation remedy are: Indiana Acts 1937, Ch. 207, pp. 1034-1055 (Housing Authority Act), as amended by Indiana Acts 1965, Ch. 384, pp. 1185-1192 (A168); Indiana Acts 1937, Ch. 209, pp. 1058-1063 (Housing Cooperation Act) (A168-A169); and the United States Housing Act of 1937, as amended, 42 U. S. C. § 1415 (A169-A170), which are set forth in pertinent part in the joint appendix at the pages indicated.

STATEMENT OF THE CASE.

The action in the district court, filed on May 31, 1968, was originally brought by the respondent United States of America pursuant to Sections 407(a) and (b) of the Civil Rights Act of 1964, 42 U. S. C. § 2006c—6(a) and (b), against respondent The Board of School Commissioners of the City of Indianapolis, Indiana, to desegregate the Indianapolis Public Schools (hereinafter called "IPS"). That action resulted in a decision by the district court on August 18, 1971, that IPS was unlawfully segregated. In its opinion the district court expressed concern that desegregation of IPS within its own boundaries would cause white flight, and it ordered that the surrounding school corporations be joined as additional defendants so that the possibility of an interdistrict remedy could be explored. *United States* v. *Board of School Commissioners etc.*, 332 F. Supp. 655 (S. D. Ind. 1971), *affirmed*, 474 F. 2d 81 (7th Cir. 1973), *cert. denied*, 413 U. S. 920 (1973).

Although respondent United States moved to add certain additional school corporations, including petitioner, as parties defendant, it failed to file any pleading asserting any claim for relief against such added defendants. Thereafter, on September 14, 1971, the district court allowed respondents Donny Brurell Buckley and Alycia Marquese Buckley to intervene as plaintiffs representing a class of school-age Negro children residing in the area served by IPS and to file a complaint seeking interdistrict relief against petitioner and the other added defendant school corporations. Jurisdiction was based upon 42 U. S. C. § 1983 and 28 U. S. C. § 1343(3). The amended complaint filed by the respondents Buckley averred that Indiana Acts 1969, Ch. 173, known as the "Consolidated First Class Cities and Counties Act," is unconstitutional and void insofar as it purports to exempt from the scope and effect of said act the consolidation of all school corporations within Marion County, Indiana, and that the purpose and effect of such exemption, as

further implemented and enabled by the provisions of Indiana Acts 1961, Ch. 186, and Indiana Acts 1969, Ch. 52, have been and are to perpetuate segregation on the basis of race and to inhibit desegregation in the public schools and school systems of Marion County.

Pursuant to the direction of the district court, respondent IPS on September 14, 1971, moved to add respondents The Metropolitan Development Commission of Marion County, the City of Indianapolis, and the Housing Authority of the City of Indianapolis as defendants, and on September 29, 1971, filed a cross-claim against them seeking declaratory relief in respect of the location of low-rent public housing projects. Subsequently, on March 19, 1973, IPS filed an additional count of cross-claim against the Housing Authority seeking to require it to maintain racially balanced housing developments.

The case was tried in June and July, 1973, on the issues formed on the amended complaint of respondents Buckley and the answers thereto. The cross-claim for declaratory judgment filed by IPS was not tried at that time. On July 20, 1973, the district court filed its memorandum of decision, 368 F. Supp. 1191, and found that the added defendants, including petitioner, had always operated unitary school systems. Nevertheless, relying on *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. 1973), the district court ordered an interdistrict remedy on the ground that the State of Indiana had been involved in the *de jure* segregation existing within IPS. In the light of this, the district court stated that it was unnecessary to consider the alleged unconstitutionality of the statutes attacked in the amended complaint of respondents Buckley.

The appeals from such judgment were decided by the Seventh Circuit on August 21, 1974. Relying on *Milliken* v. *Bradley,* 418 U. S. 717 (1974), the court of appeals held, 503 F. 2d 68, that the IPS dual school system could be dismantled within its own boundaries, and the case was remanded for this purpose. In addition, the district court was directed to "determine whether

the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warrants an interdistrict remedy in accordance with *Milliken*." (503 F. 2d at 86)

Following remand, the constitutional issues arising under the amended complaint of respondents Buckley and the issues arising under the cross-claim of respondent IPS against respondent Housing Authority of the City of Indianapolis were tried in March, 1975, and the district court's memorandum of decision, 419 F. Supp. 180, was filed on August 1, 1975. On the Uni-Gov issue, the district court found that the establishment of the Uni-Gov boundaries without a like reestablishment of IPS boundaries warranted a limited interdistrict remedy within all of Marion County in accordance with IC 20-8.1-6.5. It concluded that the number of students to be transferred to a particular school corporation shall be in such number as to cause the total enrollment of pupils in such school corporation, after the transfers have been accomplished, to be approximately 15% black. On the issues arising under the IPS cross-claim, the district court enjoined the Housing Authority from locating any additional public housing units within the boundaries of IPS and from reopening Lockefield Gardens to tenants other than the elderly.

Appeals were taken from the district court's judgment of August 1, 1975, and on July 16, 1976, the Seventh Circuit affirmed, 541 F. 2d 1211. Review of the judgment of the court of appeals was then sought in the Supreme Court of the United States, and on January 25, 1977, this Court, 429 U. S. 1068, summarily vacated the judgment and remanded the case to the court of appeals for further consideration in the light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), and *Washington* v. *Davis*, 426 U. S. 229 (1976). In turn, on February 14, 1978, the court of appeals, 573 F. 2d 400, vacated the district court's judgment of August 1, 1975, and remanded the case to that court for further findings of fact on whether the relevant acts

or omissions of state or local officials were motivated, at least in part, by a racially discriminatory purpose or intent.

Following remand, the district court on April 7, 1978, determined that the existing record was sufficient for purposes of making the findings required by the mandate and that no further evidentiary hearing need be had. Thereafter, on July 11, 1978, the district court filed a memorandum of decision, 456 F. Supp. 183, in which it found that the actions of the Indiana General Assembly—in failing to expand the boundaries of IPS to the county limits when in 1969 it reorganized and consolidated various but not all city and county civil governmental functions —were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County. With respect to the public housing issue, the district court found that the action of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating public housing projects within IPS, as well as the opposition of the suburban governments to the location of public housing within their borders, were racially motivated with the invidious purpose to keep the blacks within pre-Uni-Gov Indianapolis and IPS, and to keep the territory of the suburban school corporations segregated for the use of whites only. The district court's conclusion of law was that its previous judgment of August 1, 1975, should be reinstated, and a judgment was so entered on July 11, 1978.

Appeals to the Seventh Circuit were taken from the district court's judgment of July 11, 1978, and on August 11, 1978, the court of appeals granted the motion of respondent IPS for limited remand for district court consideration of alternative remedy proposals.

The case was tried in the district court in November, 1978, on the various issues set forth in the limited remand order, and on April 24, 1979, the district court filed its memorandum of

decision. (A101-A129) It found that, since a remedy can be designed to redress only the difference between present racial distribution and what it would have been in the absence of constitutional violations, a plan implementing the previous judgment of July 11, 1978, would be best adapted to overcome the combined effect of the constitutional violations previously found by the court. The only previously found constitutional violation having the required interdistrict effect was the locating of all low-rent public housing projects within IPS. Neither the exclusion of schools when various city and county civil governmental functions were reorganized and consolidated in 1969 nor the *de jure* segregation practiced within IPS had a direct interdistrict effect sufficient to justify a countywide remedy. On July 9, 1979, the district court entered a judgment (A130-A135) requiring the busing of black pupils from IPS to eight other school corporations within Marion County.

Appeals were taken from the district court's judgment of July 9, 1979, and on April 29, 1980, the Seventh Circuit, in a 2-1 decision, Circuit Judge Tone dissenting, affirmed the portions of the judgment appealed from by petitioner. (A1-A53) The majority approved the findings of the district court that the actions of the Indiana General Assembly—in failing to expand the boundaries of IPS to the county limits when in 1969 it reorganized and consolidated various but not all city and county civil governmental functions—and of respondents the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County—in locating all public housing projects within the boundaries of IPS—were done, at least in part, with a racially discriminatory intent and purpose. With respect to the scope of the remedy, the majority held that the difficulty encountered by the district judge in attributing specific incremental effects to the failure to expand IPS boundaries does not mean that that violation cannot support an interdistrict remedy. The majority noted that the decision to prevent IPS from expanding with the city of

Indianapolis was a decision affecting the consolidated city and county as a whole, and not just certain schools or certain school districts within the consolidated city. The majority, therefore, approved the interdistrict remedy decreed by the district court. While holding that the transfer plan is also an appropriate remedy for the discriminatory placing of all public housing projects within IPS, the majority noted that, if this had been the only constitutional violation present, an appropriate remedy on this record would have to be limited to the territory within the Housing Authority's area of operation at the time the projects were built.

On May 29, 1980, the court of appeals granted a stay of mandate with respect to the interdistrict remedy pending application to this Court for a writ of certiorari.

The historical background of the decision to exclude school districts from the reorganization and consolidation of various but not all city and county civil governmental functions in Marion County (popularly termed "Uni-Gov") does not reveal a series of official actions taken for invidious purposes. On the contrary, the Indiana public school system has always been administered separately and apart from local civil government, and the boundaries of a school district serving a civil city have not always been coterminous with the boundaries of the civil city.

There is little about the specific sequence of events leading up to the challenged decision that would spark suspicion. To assure school corporations of an adequate tax base, the identification of school district boundaries with the boundaries of civil units of government was terminated by The School Corporation Reorganization Act of 1959, IC 20-4-1, on a statewide basis. The school districts in Marion County were reorganized in 1962, and the validity of such reorganization has not been challenged. The purpose of the Uni-Gov legislation was to accomplish various civil governmental reforms unrelated to schools. The repeal of special legislation enacted in 1961 to

permit IPS to grow with the civil city of Indianapolis notwithstanding the provisions of the School Reorganization Act was unrelated to the Uni-Gov legislation and had first been attempted two years before. Moreover, IPS had not in fact expanded under the special legislation, and in 1967 had formally gone on record renouncing any intention to expand with the civil city.

There were no departures from the normal procedural sequence and no substantive departures. On the contrary, the 1961 special legislation was a substantive departure from the uniform state policy of fixed school boundaries embodied in The School Corporation Reorganization Act of 1959, and the 1969 repeal of the 1961 special legislation represented a return to state-wide uniformity. Moreover, schools, being independent of local civil government, would not have been affected by the Uni-Gov legislation even if they had not been expressly excluded.

The legislative history establishes that the Uni-Gov legislation and the repeal of the 1961 special legislation were separate and unrelated. They were sponsored by different groups with different objectives, and the repeal of the 1961 special legislation was first attempted in 1967 whereas the idea for Uni-Gov did not start to evolve until sometime in 1968.

The testimony of persons participating in the drafting and passage of the legislation in question called to the stand at the trial was clear and unequivocal that race was not a factor in the decision to exclude schools from consolidation in Marion County.

The first act of the city-county council under Uni-Gov was to enact a countywide fair housing ordinance. The district court found (A109-A110) that the number of black children in Marion County schools outside of IPS had increased from 1,220 in school year 1968-69, the last year before Uni-Gov, to 4,392 in the school year 1978-79—an increase of 360%.

During the same period of time, the number of blacks in IPS declined from 36,586 to 34,962.

Marion County has had countywide planning and zoning since 1957. The same standards apply for zoning inside the boundaries of IPS as apply in the rest of the county. The largest percentage of undeveloped land already zoned for multi-family use is located outside of IPS boundaries. There is a large amount of land available in suburban areas of the county for development with houses in a modest price range, and there is existing housing available all over the county in such price range. The Housing Authority of the City of Indianapolis did not have a cooperation agreement with the governing body of Marion County at the time it built ten low-rent public housing projects in the late 1960s, and, therefore, such projects could not be financed under the United States Housing Act of 1937 if located in the Authority's area of operation lying outside the territorial boundaries of the then-existing city of Indianapolis (IPS territory). No evidence was introduced at any stage of the proceedings to show that any school district opposed the location of public housing within its borders. So far as petitioner is concerned, the record affirmatively shows that it has never taken a position against a public housing project. Every such public housing project, although built within IPS boundaries, was located in a neighborhood that was white, or predominately white, at the time the project was commenced. Federally-subsidized apartment projects under § 236 of the National Housing Act have been built throughout the county, all are located outside of IPS boundaries, and there are black families in these projects.

REASONS FOR GRANTING THE WRIT.

I.

In approving the findings of the district court that the actions of the Indiana General Assembly—in failing to expand the

boundaries of IPS to the county limits when in 1969 it reorganized and consolidated various but not all city and county civil governmental functions in Marion County—and of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County—in locating all public housing projects within the boundaries of the Indianapolis Public Schools—were done, at least in part, with a racially discriminatory intent and purpose, the court of appeals has decided federal constitutional questions in a way in conflict with the applicable decisions of this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), and *Washington* v. *Davis*, 426 U. S. 229 (1976). The record, as explicated by Circuit Judge Tone in his masterly dissenting opinion (A28-A53), clearly does not support the findings of discriminatory intent and purpose.

The record on the issue of liability has not been supplemented since the 1975 trial. It discloses a complete failure of proof on the existence of a racial motive in the exclusion of school consolidation from the Uni-Gov legislation. The absence of racial motive was the subject of testimony (1975 Tr. 51) and comment by the court (1975 Tr. 359-60) and counsel (1975 Tr. 417) at the trial. Although the question of discriminatory racial intent was in issue under the pleadings, the record would not have supported a finding of discriminatory racial intent; and the district court, accordingly, made no such finding in the memorandum of decision reported in 419 F. Supp. 180. Moreover, in affirming the judgment of the district court—which was substantially the same as its subsequent judgment of July 9, 1979—on the basis of the entire record and the findings of the district court, the court of appeals, in its opinion reported in 541 F. 2d 1211, conceded that the Uni-Gov legislation and opposition to school consolidation in Marion County were not racially motivated. (541 F. 2d at 1217, 1220-1221)

Review of the judgment of the court of appeals was then sought in this Court, and this Court, 429 U. S. 1068, sum-

marily vacated the judgment and remanded the case to the court of appeals for further consideration in the light of *Arlington Heights* and *Washington*. Upon receipt of the mandate from this Court, the court of appeals issued an opinion, 573 F. 2d 400 (A54-A81), vacating the judgment of the district court and remanding the case for further findings on the ground that existence or absence of discriminatory intent could not be determined as a matter of law from the existing record. (A63-A64, A71, A79-A80) But the district court, upon receipt of the mandate of the court of appeals, determined that the existing record was indeed sufficient for purposes of making the required findings and that no further evidentiary hearing need be had. In its memorandum of decision, 456 F. Supp. 183 (A84-A100), the district court purported to consider the case in the light of the subjects of inquiry identified in *Arlington Heights* and found "that the actions of the General Assembly * * * were done, at least in part, with the racially discriminatory intent and purpose of confining black students in the IPS school system to the 1969 boundaries of that system, thereby perpetuating the segregated white schools in suburban Marion County." The court of appeals affirmed (A1-A28), stating that it did not believe that "the conclusion of discriminatory purpose was clearly erroneous in light of evidence in the record." (A11)

Thus, the court of appeals' view of the existing record has undergone a metamorphosis from a position that it contains no evidence that the actions in question were racially motivated to a position that the existence or absence of discriminatory intent cannot be determined from the existing record to a position that the district court's finding of discriminatory intent is not clearly erroneous in the light of evidence in that same, unsupplemented record.

The finding of discriminatory intent in the failure to expand the boundaries of IPS to the county limits in 1969 was predicated upon a supposed substantive departure from a long-

established rule that the school city of Indianapolis should expand with the civil city. The finding of discriminatory intent in the locating of all public housing projects within the boundaries of IPS was predicated upon the supposed failure of the Housing Authority of the City of Indianapolis to make a serious attempt to obtain a cooperation agreement with the governing body of Marion County so that projects could be located in the Authority's area of operation outside of IPS. But as demonstrated by the dissenting opinion of Circuit Judge Tone (A28-A53), the record does not support these findings.

II.

Without regard to the existence of a discriminatory racial intent or purpose, the holding of the court of appeals that the exclusion of schools from consolidation in the Uni-Gov legislation had a significant segregative interdistrict impact is in conflict with applicable decisions of this Court.

A.

The holding of the court of appeals that the exclusion of schools from the Uni-Gov legislation passed in 1969 had a significant segregative interdistrict impact within the requirements of *Milliken* v. *Bradley*, 418 U. S. 717 (1974), is in conflict with the decision of the Supreme Court in *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U. S. 189 (1973).

In its 1978 opinion following remand of the case from this Court, the court of appeals reasoned:

> "* * * In what way did the State's choice of retaining the old IPS boundaries in lieu of expanding it with the City boundary have a segregative impact? It did so, we think, in curtailing the power of IPS to remedy its own violations. Had IPS expanded with the City, it could have accomplished desegregation by spreading its black school population throughout a larger area, much as the district court ordered. * * * In short, the combined 1969 legisla-

> tion had the effect of ensuring that the effort to desegregate IPS (which had been initiated a year earlier by the Department of Justice) would not extend to white suburban areas." (573 F. 2d at 407) (A64-A65)

In its 1980 opinion, the court of appeals approved the remedy ordered by the district court, saying:

> "It is now clear, if it were ever in doubt, that the 'incremental effects' test applies only to cases where discrete isolated examples of discrimination are established. Proof of systemwide discrimination, in contrast, still calls for a systemwide remedy. It is the latter that we have here. The decision to prevent IPS from expanding with the City of Indianapolis was a decision affecting the city as a whole, not just certain schools or certain school districts within the city. * * *" A20-A21)

But the decision to prevent IPS from expanding to the boundaries of the new consolidated city did not have a segregative impact throughout the area of the consolidated city, because the constitutional violations by IPS occurred prior to the enactment of Uni-Gov and were confined to its system.

Even if IPS had expanded to the boundaries of the consolidated city on January 1, 1970, when Uni-Gov took effect, the constitution would not have required a desegregation remedy for IPS extending beyond its previous boundaries. In *Keyes, supra,* it was recognized that *de jure* segregation confined to a portion of a single school district would not necessarily require that the entire district be included in the desegregation plan, this Court saying:

> "In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a ques-

> tion of fact to be resolved by the trial court in the first instance, but such cases must be rare. * * *" (413 U. S. at 203)

And in remanding the case to the district court for further proceedings, this Court continued:

> "In summary the District Court on remand, *first*, will afford respondent School Board the opportunity to prove its contention that the Park Hill area is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district. * * * (413 U. S. at 213)

The essential findings required by *Keyes* have already been made in the case at bar. In its 1973 opinion the district court found:

> "There was no evidence that any of the added defendant school corporations have committed acts of *de jure* segregation directed against Negro students living within their respective borders. * * *" (368 F. Supp. at 1203)

And in its opinion of April 24, 1979, the district court repeated:

> "* * * [T]here is no evidence that any of them [added defendant school corporations] has operated anything other than a unitary school system. * * *" (A114)

Since the added defendant school corporations prior to Uni-Gov had never been a part of the IPS district, *Keyes* requires that, had Uni-Gov consolidated them with IPS, they be treated as separate, identifiable and unrelated units and excluded from the IPS desegregation plan.

B.

The holding of the court of appeals that the exclusion of schools from the Uni-Gov legislation passed in 1969 had a significant segregative interdistrict impact because it curtailed the power of IPS to accomplish desegregation "by spreading its black population throughout a larger area" is also in conflict with the decisions of the Supreme Court in *Spencer* v. *Kugler*,

404 U. S. 1027 (1972), and in *Milliken* v. *Bradley*, 418 U. S. 717 (1974). In *Spencer* the claim that there is an affirmative constitutional duty to achieve racial balance among the several school districts of a state system of public schools was rejected, and in *Milliken* the assumption that the Detroit schools could not be truly desegregated unless the racial composition of the student body of each school substantially reflected the population of the metropolitan area as a whole was also rejected. Accordingly, since the State of Indiana did not have an affirmative duty to expand IPS boundaries so that its black population could be spread throughout a larger area, its failure to do so when Uni-Gov was adopted did not have a significant segregative interdistrict impact.

III.

The holding of the court of appeals that the action of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating all public housing projects within the boundaries of IPS can be the basis for an interdistrict school desegregation remedy should be reviewed by this Court for two separate reasons.

A.

In holding that an interdistrict school desegregation remedy can be based on the action of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating all public housing projects within IPS boundaries, without any discriminatory action by the school authorities, the court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court. The sole authority cited for such holding by the courts of appeals is a dictum contained in the concurring opinion of Mr. Justice Stewart in *Milliken* v. *Bradley*, 418 U. S. 717, 755 (1974). However, the question was expressly left undecided in

Swann v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), where a unanimous Supreme Court said:

> "* * * The target of the cases from Brown I to the present was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurdisdiction of the school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of Brown I to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination. We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree. This case does not present that question and we therefore do not decide it." (402 U. S. at 22-23)

B.

The holding of the court of appeals that an interdistrict school desegregation remedy can be based on the action of the Housing Authority of the City of Indianapolis and the Metropolitan Development Commission of Marion County in locating all public housing projects within IPS boundaries is also in conflict with the decision of the Supreme Court in *Hills* v. *Gautreaux,* 425 U. S. 284 (1976). Petitioner and the other added defendant school districts have not been implicated by any record evidence in the unconstitutional conduct of the authority and the commission in locating all public housing within IPS. An interdistrict school desegregation decree is impermissible because it is not commensurate with the constitutional violation to be remedied. The remedy most closely tailored to fit the constitutional violation, and consistent with *Gautreaux,* would have been a remedial decree against the authority and the commission directing them to locate public housing in the authority's area

of operation lying outside the boundaries of IPS. The remedy approved by the court of appeals impermissibly restructures and displaces the authority of school districts that have not been implicated in the unconstitutional conduct.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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